Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-1544

IVAN DUNCAN,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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I N D E X

PAGE

A. OPINION BELOW..... 8

B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED..... 8

C. THE QUESTIONS PRESENTED FOR REVIEW..... 9

D. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 10

E. A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTINENT TO THE CONSIDERATION OF THE QUESTIONS PRESENTED..... 11

F. THE STAGES OF THE PROCEEDINGS IN WHICH THE ISSUES INVOLVED WERE RAISED AND THE MANNER IN WHICH THEY WERE RAISED..... 16

G. ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT..... 17

POINT ONE

THE TRIAL COURT'S SUBMISSION TO THE JURY OF AN ADDITIONAL THEORY OF CRIMINAL LIABILITY DURING JURY DELIBERATIONS DEPRIVED PETITIONER OF THE RIGHT TO COUNSEL AND THE DUE PROCESS RIGHT TO ARGUE HIS CASE TO THE JURY..... 17 - 21

INDEX (continued

PAGE

POINT TWO

THE NEW STATUTORY SCHEME, WHICH PERMITS THE SUBMISSION OF ADDITIONAL THEORIES OF LIABILITY TO THE JURY AFTER SUMMATIONS ARE CLOSED, IS UNCONSTITUTIONAL UNDER THE RIGHT TO COUNSEL AND DUE PROCESS CLAUSES..... 22

POINT THREE

THE TRIAL COURT'S REFUSAL TO PERMIT A DEFENSE WITNESS TO TESTIFY THAT THE PROSECUTOR'S CHIEF WITNESS HAD HERSELF PREVIOUSLY PLOTTED TO COMMIT THE SAME CRIME SHE TESTIFIED WAS COMMITTED BY THE PETITIONER DEPRIVED PETITIONER OF THE CONSTITUTIONAL RIGHT TO CALL WITNESSES ON HIS OWN BEHALF..... 23 - 25

AUTHORITIES CITED

Cases

	PAGE
Herring v. New York, 422 U.S. 853 (1975)	20
Chamber v. Mississippi, 410 U.S. 284 (1973)	23 & 24
Argersinger v. Hamlin, 407 U.S. 25 (1972)	19
Wisconsin v. Constantineau, 400 U.S. 433 (1970)	18
Washington v.Texas, 388 U.S. 14 (1967)	23 & 24
Holt v. Virginia, 381 U.S. 131 (1965)	18
Gideon v. Wainwright, 372 U.S. 25 (1962)	19
In re Oliver, 333 U.S. 259 (1947)	18 & 23
Carter v. Illinois, 329 U.S. 173 (1946)	19
Betts v. Brady, 316 U.S. 455 (1942)	19
Johnson v. Zerbst, 304 U.S. 458 (1937)	19
Powell v. Alabama, 287 U.S. 45 (1932)	18 & 19
United States v. De Loach, F 2d 185 (D.C. Cir. 1974)	20

	PAGE
Mathews v. United States, 449 F 2d 985 (D.C. Cir. 1971)	20
United States v. Walls, 443 F 2d 1220 (6th Cir. 1971)	20
United States v. Sawyer,443 F 2d 712 (D.C. Cir. 1971)	20
United States ex. rel. Wilcox v. Pennsylvania, 273 F.S. 923 (E.D. Pa. 1967)	20

STATUTES

PAGE

New York Criminal Procedure Law:

Section 260.30 17
300.10 17
310.30 ..... 17 & 22

OTHER AUTHORITIES

Wigmore, Evidence, §139-142 (3rd ed. 1940) 24

APPENDICES:

PAGE

A- ORDER OF NEW YORK COURT OF APPEALS AFFIRMING CONVICTION..... 26 - 27

B- ORDER OF THE NEW YORK COURT OF APPEALS DENYING REARGUMENT..... 28 - 29

C- OPINION OF THE NEW YORK COURT OF APPEALS..... 30 - 43

D- ORDER OF AFFIRMANCE BY APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT..... 44 - 47

E- CONSTITUTIONAL PROVISIONS..... 48

F- STATUTES INVOLVED..... 49 - 50

IN THE
SUPREME COURT OF THE UNITED STATES
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NO._____

IVAN DUNCAN,

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-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

Petitioner prays that a writ of certiorari be issued to review the order and judgement of the Court of Appeals of the State of New York entered in the above entitled matter on December 7, 1978, reported in 46 NY 2d 74 , and the Order of the same Court entered in the above entitled matter on February 6, 1979, denying reargument (not yet officially reported).

A. OPINION BELOW

On December 7, 1978, the New York Court of Appeals handed down its opinion wherein that Court unanimously affirmed the conviction of Petitioner. Said opinion, officially reported at 46 NY2d 74 , is appended to this petition as Appendix C.

The Appellate Division, Second Department, of the New York Supreme Court had also reviewed the conviction and unanimously affirmed same without opinion, on January 24, 1977. The order of affirmance is officially reported at 55 AD2d 1054 and is appended to this petition as Appendix D.

B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment sought to be reviewed herein is the judgment and order of the New York Court of Appeals made and entered on December 7, 1978 and appended hereto as Appendix A, and the order of the same Court

entered on February 6, 1979, denying re-argument, appended hereto as Appendix B.

Jurisdiction in this Court is invoked under Title 28, U.S. Code, Section 1257 (3) and Rule 19, Subdivision 1 of the Rules of this Court.

C. THE QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court's submission to the jury of an additional theory of criminal liability during jury deliberations and after the defense summation deprive Petitioner of the due process right to argue his case to the jury?

2. Is the New York Statutory scheme, which permits the submission of additional theories of liability to the jury after summations are closed, constitutional under the right to counsel and due process clauses?

3. Did the trial court's refusal to permit a defense witness to testify that the prosecution's chief witness had herself

previuosly plotted to commit the same crime she testified was committed by Petitioner deprive Petitioner of the constitutional right to call witnesses on his own behalf?

D. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this petition are the right to due process of law under the Fourteenth Amendment of the United States Constitution and the accused's right to call witnesses in his own behalf under the Sixth Amendment to the United States Constitution and the accused's right to counsel under the Sixth Amendment to the United States Constitution. The pertinent portions thereof are set forth in Appendix E of this petition.

The statutes involved are the New York Penal Law, Section 20.00 and New York Criminal Procedure Law, Sections 260.30 (8-11) 300.10 (1) and 310.30. The pertinent portions thereof are set forth in Appendix F of this petition.

E. A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

(a) Statement of the Case

Petitioner was convicted after jury trial in the County Court of the State of New York, Westchester County, on May 9, 1975, of the crimes of Murder in the Second Degree (four counts) (N.Y. Penal Law, Sections 125.25, Subds. 1 and 3), Attempted Robbery in the First Degree (one count) (N.Y. Penal Law, Section 110/160.15) and Possession of a Weapon in the Fourth Degree (two counts) (N.Y. Penal Law, Section 265.02) and sentenced to two consecutive terms of twenty-five years to life imprisonment and other concurrent sentences. Petitioner is presently incarcerated pursuant thereto.

Upon timely appeal to the Appellate Division of the New York Supreme Court, Second Judicial Department, the conviction

was unanminously affirmed, without opinion, on January 24, 1977.

Upon timely appeal to the New York Court of Appeals the conviction was unanimously affirmed in an opinion per COOKE, J., on December 7, 1978. A timely motion for reargument was denied on February 6, 1979.

(b) Material Facts

The indictment in the instant case charged the Petitioner with each of its counts as the sole principal, without any theory of acting in concert alleged therein or in any Bill or Particulars.

The prosecution's trial evidence, consistent with this theory, was that Petitioner alone committed the crimes while the prosecution's chief witness, Ziriphia Mayhew, looked on in horror, without any complicity whatsoever. The petitioner's own testimony was that he waited in the car outside while Mayhew went inside the apartment to ask to borrow some money from her aunt and when he

went in to check on what was taking her so long, he came upon Mayhew and the freshly-completed murders.There was no evidence offered to support Petitioner's guilt as an accomplice of Mayhew on an acting-in-concert theory. Indeed, the trial court rejected the prosecution's specific, written request for such a charge before the case was submitted to the jury.

At the conclusion of the first day of jury deliberations, however, the jury, in an omnibus note to the court, requested "the elements of guilt between partners in crime". The trial judge stated that it now intended to submit to the jury the theory of accessorial liability under N.Y. Penal Law, Section 20.00. Defense counsel objected to such a charge as "seriously prejudicial" unless the court also granted a defense request he was now making to submit along with such a charge the lesser included crime of Criminal Facilitation under N.Y. Penal Law, Section 115.05. The court denied the

defense request as untimely, and an exception was taken.

Thereafter, the court instructed the jury as to the law of accessorial liability and specifically informed the jury that it was not necessary to find that Petitioner robbed or stabbed the victims and that it would still find him guilty, as Mayhew's accomplice, even if she herself committed the robbery and murders. The court also added an instruction pursuant to N.Y. Penal Law, Section 20.05, reading the statutory language concerning "an offense in which the criminal liability of the defendant is based upon the conduct of another person" and stating that "the fact that Ziriphia Mayhew has been granted immunity from prosecution for the conduct which is the basis of the counts in the indictment here, is no defense".

On the fourth day of deliberation, the jury again requested the charge on accessorial liability and defense counsel reit-

erated the exception numerous times. The charge was given to the jury on the fifth day, in substantially the same terms as previously given and shortly thereafter the jury convicted Petitioner.

Mayhew had tesified during the prosecution's case that on the night of the occurance Petitioner had gone to the apartment where the murders took place to role Mayhew's aunt and had taken a hammer with him to use as a weapon. During the defense case, Petitioner's counsel offered testimony from one Joseph Stanley Allen, Mayhew's husband (the marital privilege was waived), that approximately one year before the murders, Mayhew had a conversation with him one night in which she stated that she was going to the deceased's apartment to steal money from her and that if her aunt "woke up on her" she would kill her, and that Mayhew thereupon went to the apartment with a hammer in her handbag. The trial judge refused to permit Allen to testify.

F. THE STAGES OF THE PROCEEDINGS IN WHICH THE ISSUES INVOLVED WERE RAISED AND THE MANNER IN WHICH THEY WERE RAISED.

The issue dealing with the propriety of the trial court first submitting the theory of accessorial liability to the jury after summations and during deliberations was raised in the trial court, in the appeal to the Appellate Division of the Supreme Court, Second Department, and in the New York Court of Appeals.

The issue dealing with the constitutionality of the New York statutes permitting the submission of additional theories of liability to the jury after summations are closed is raised for the first time in this court.

The issue dealing with the trial court's refusal to permit a defense witness to testify was raised in the trial court, in the appeal to the Appellate Division of the Supreme Court, Second Department, and in the New York Court of Appeals.

G. ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

POINT ONE

THE TRIAL COURT'S SUBMISSION TO THE JURY OF AN ADDITIONAL THEORY OF CRIMINAL LIABILITY DURING JURY DELIBERATIONS DEPRIVED PETITIONER OF THE RIGHT TO COUNSEL AND THE DUE PROCESS RIGHT TO ARGUE HIS CASE TO THE JURY

In the instant case, there was no evidence of acting-in-concert and a charge on accessorial liability was denied when requested by the prosecutor.

Petitioner's counsel made no closing argument on this theory of liability. It was not until after summation that this charge was given to the jury. Petitioner's counsel was precluded, under New York Law (CPL Sections 260.30, 300.10, 310.30 [Appendix F]) from making any remarks on the issue. The juncture at which

this charge was given acted as a total ban on Petitioner's right to make a closing argument on an issue which became crucial to the case and therefore denied Petitioner his right to counsel.

It has long been recognized by this Court that the right of a defendant to be heard in his defense is a fundamental right. In re Oliver, 333 U.S. 259 (1947); Powell v Alabama, 287 U.S. 45 (1932); Holt v Virginia, 381 U.S. 131 (1965); Wisconsin v Constantineau, 400 U.S. 433 (1970). Included in this right is the right to effective assistance of counsel and the right to make a summation to a jury on the various points of fact and law in a given case. The importance of these fundamental rights has best been stated by this Court in In re Oliver, 333 U.S. 259 (1947) at p. 273.

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our

> system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

In a long development of cases, this Court has held that the right to counsel is a fundamental Due Process right to be afforded all criminal defendants. Powell v Alabama, 287 US 45 (1932); Johnson v Zerbst, 304 U.S. 458 (1937); Betts v Brady, 316 U.S. 455 (1942); Gideon v Wainwright, 372 U.S. 335 (1962); Argersinger v Hamlin, 407 U.S. 25 (1972). It has further been recognized that this right to counsel exists at every stage of the trial. Carter v Illinois, 329 U.S. 173 (1946).

The summation by defense counsel is a part of the trial where there is a necessity for the assistance of counsel. It has been held, by various Federal Courts, that the failure of defense councel to make a summation or an unreasonable restriction by the Court on counsel's summation is a denial of the defendant's Constitutional

right to counsel. Mathews v United States, 449 F 2d 985 (D.C. Cir. 1971); United States v Walls, 443 F 2d 1220 (6th Cir. 1971); United States ex rel. Wilcox v Pennsylvania, 273 F.S. 923 (E.D. Pa 1967). This Court as well, has recognized this position. Herring v New York, 422 U.S. 853 (1975).

Moreover, inherent in the Due Process right to be heard is the right of a defendant to present closing argument to the jury. A defendant must be allowed to argue the applicable law and facts to the jury. United States v De Loach, 504 F 2d 185 (D.C. Cir. 1974) cert. den. 426 U.S. 909 (1976); United States v Sawyer, 443 F. 2d 712 (D.C. Cir. 1971). This court has clearly noted the importance of the closing argument. Herring v New York, 422 U.S. 853 (1975). As was pointed out in that case closing argument is a time for counsel to "sharpen and clarify the issues" in a case; indeed, it may be the last opportunity

counsel has to present his case to the jury. That this right is a fundamental one was clearly stated by this Court in Herring, Supra, (at p. 858);

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial... A total denial of closing argument is a denial of the basic right of the accused to make his defense.

The total preclusion of the trial court of any comment by Petitioner's counsel upon the issue of accessorial liability violated Petitioner's right to the assistance of counsel and right to make closing argument on a point which became essential to the defense.

POINT TWO

THE NEW YORK STATUTORY SCHEME, WHICH PERMITS THE SUBMISSION OF ADDITIONAL THEORIES OF LIABILITY TO THE JURY AFTER SUMMATIONS ARE CLOSED, IS UNCONSTITUTIONAL UNDER THE RIGHT TO COUNSEL AND DUE PROCESS CLAUSES.

In the instant case the New York Court of Appeals held that the submission of accessorial liability to the jury for the first time during deliberations was proper under New York Criminal Procedure Law, Section 310.30. A statute permitting the submission of additional theories of liability to the jury after the closing arguments violates Petitioner's rights to counsel and summation, as discussed in Point One, supra, and must be declared unconstitutional.

POINT THREE

THE TRIAL COURT'S REFUSAL TO PERMIT A DEFENSE WITNESS TO TESTIFY THAT THE PROSECUTOR'S CHEIF WITNESS HAD HERSELF PREVIOUSLY PLOTTED TO COMMIT THE SAME CRIME SHE TESTIFIED WAS COMMITTED BY THE PETITIONER DEPRIVED PETITIONER OF THE CONSTITUTIONAL RIGHT TO CALL WITNESSES ON HIS OWN BEHALF.

It is Petitoner's constitutional right, under the Sixth Amendment to call witnesses in his own behalf. This right has been recognized by this Court as fundamental to our system of jurisprudence. In re Oliver, 333 U.S. 259 (1947); Washington v Texas, 388 U.S. 14 (1967); Chambers v Mississippi, 410 U.S. 284 (1973).

At trial in the present case Petitioner sought ot present the testimony of one Joseph Stanley Allen, husband of the chief prosecution witness, to show that this prosecution witness had reason to implicate the Petitioner and may have actually been the person who committed the crimes charged herein. The testimony of Mr. Allen would

have shown that the prosecutor's witness had, on a prior occasion, voiced the intention to commit the very crime for which Petitioner was convicted, and took affirmative steps toward its commission. The trial court would not allow Petitioner's witness to testify.

That such evidence, showing the commission of the crime charged by someone else, is proper evidence cannot be doubted. Chambers v Mississippi, 410 U.S. 284 (1973); Washington v Texas, 388 U.S. 14 (1967); Wigmore, Evidence, §139-142 (3rd ed. 1940). In Chambers, supra, where the Petitioner had sought to present similiar evidence at his trial this Court held that even in light of the hearsay involved such such evidence was properly offered by the Petitioner in his defense at trial.

This Court has stated in Chambers v. Mississippi, 410 U.S. 284 (1973) at 302 that "few rights are more fundamental than

that of an accused to present witnesses in his own defense." Nevertheless, Petitioner's right to do so was deprived by the trial court's refusal to allow Mr. Allen to testify.

CONCLUSION

THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: Brooklyn, N.Y.
April, 1979

Respectfully submitted

BENNETT M. EPSTEIN, ESQ.
Attorney for Petitioner

JEFFREY A. RABIN, ESQ.
of Counsel

A P P E.N D I C E S

APPENDIX A

ORDER OF NEW YORK COURT OF APPEALS AFFIRMING CONVICTION.

COURT OF APPEALS

STATE OF NEW YORK
The Hon. Charles D. Breitel, Cheif Judge, Presiding.

No. 510

The People &c.,

Respondent,

vs.

Ivan Duncan,

Appellant.

The appellant in the above entitled appeal appeared by Bennett M. Epstein;

The respondent appeared by Carl Vergari, District Attorney of Westchester County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Cooke, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the County Court, Westchester County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAN
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
December 7, 1978.

APPENDIX B

ORDER OF THE NEW YORK COURT OF APPEALS
DENYING REARGUMENT

Mo. No. 32

The People &c.,

Respondent,

vs.

Ivan Duncan,

Appellant.

Motion for reargument denied.

Decision Court of Appeals FEB 6 1979

APPENDIX C

OPINION OF THE NEW YORK COURT OF APPEALS

State of New York
Court of Appeals
No. 510

The People &c.,
Respondent,

vs. OPINION

Ivan Duncan,
Appellant.

COOKE, J.;

On the morning of September 25, 1974, police officers arrived at an apartment in the City of Mount Vernon and encountered a horrifying scene. Two elderly women, their corpses riddled with stab wounds, lay dead on the bedroom floor. Robbery appeared to have been the underlying motive. The apartment itself was in complete disarray, with papers, clothing and women's hand bags scattered about, blood splattered on the walls and floor and prints from bloodied men's sneakers in the bedroom and bathroom.

A preliminary investigation unveiled the defendant and his common law wife Ziriphia Mayhew, the niece of one of the victims, as suspects in the crime.

As the inquiry proceeded, it became apparent that defendant and Mayhew were indeed involved in the events of the prior evening. In return for a grant of immunity, Mayhew implicated defendant to such an extent that he was soon indicted and tried for two counts of intentional murder (Penal Law, §125.25, subd 1), two counts of felony murder (Penal Law, §124.25, subd 3), one count of attempted robbery in the first degree (Penal Law, §165.15, subd 1) and four counts of criminal possession of a weapon in the fourth degree (Penal Law, §265.01, subd 2).

At trial, the most damaging incriminating evidence was supplied by Mayhew's testimony. It had previously been established that on prior occasions the two had

discussed the means whereby they could separate Mayhew's aunt from her money. Indeed, on one occasion defendant had stated in the presence of Mayhew and a third person that they would "have to hurt her to get it." On the night of September 24, 1974, defendant put his plan into action.

According to Mayhew, after stating that she was going to retrieve some personal items at her aunt's apartment, defendant asked to accompany her so that he could "get some scratch money." On the way to their destination, defendant stopped off at a friend's apartment and borrowed a hammer. Upon arriving at the victim's apartment, the couple was surprised to see that Mayhew's aunt had guests. They stayed only a few minutes, during which time defendant surreptitiously entered the bedroom and searched for cash. His quest proved unsuccessful, however,

and the couple journeyed elsewhere, waiting for the guests to depart.

Later that evening, Mayhew and defendant returned to her aunt's apartment and noticed that the visitor's car was no longer in sight. Defendant told Mayhew that he intended to "rip off" her aunt and kill the two elderly women. When Mayhew sat in silence, defendant punched her in the chest and she agreed to accompany him into the apartment. Mayhew testified that she watched terror stricken as defendant savagely murdered the two women, first striking them with the hammer and later repeatedly stabbing them, after his efforts to extract money proved unsuccessful. The couple then drove home, where defendant laundered his blood-stained clothes and sneakers, after first disposing of the murder weapons in a nearby sewer.

As might be expected, defendant's version of the events of that night tended

to significantly downplay his role in the crimes. Testifying on his own behalf, defendant claimed that he had waited in the car while Mayhew went to the apartment to ask her aunt for money. After waiting over one-half hour for her return, defendant went upstairs and knocked on the apartment door. Some time later, the door opened and defendant encountered Mayhew in a state of shock, the bloodied bodies of the two women lying on the bedroom floor. Upon seeing the bodies, defendant testified, he asked Mayhew what had happened and received a response that there had been an altercation. Mayhew prevented him from summoning assistance and disposed of the weapons on their way home.

As the testimony unfolded, it became apparent that under either version of the relevant testimony, Mayhew was no mere witness to the crime. Under any view of the evidence, Mayhew participated in the events of that night to such an extent that she

could have been prosecuted for the underlying offenses but for her grant of immunity. She was, at the very least, an accomplice to the crimes for which defendant was charged (CPL 60.22, subd 2; see People v Dlugash, 41 NY2d 725, 731; People v Beaudet, 32 NY2d 371, 376). Being such, her testimony took on a special significance.

The law looks upon accomplice testimony with a suspicious eye. Especially when traded for immunity from prosecution, such evidence must be scrutinized with the utmost caution and circumspection because, while such testimony is certainly competent, its lacks the inherent reliability attached to the testimony of a disinterested witness. To compensate for its untrustworthy nature and to insure the rights of the defendant, accomplice testimony, standing alone, is insufficient to sustain a criminal conviction (People v. Kress, 284 NY 452, 460). Thus, where the undisputed evidence establishes a witness as an accomplice, the

jury must be so instructed and charged that the witness' testimony must be corroborated by independant evidence materially connecting defendant with the commission of the crime (People v. Basch, 36 NY2d 154, 159; People v Ohlstein, 54 AD2d 109, affd 44 NY2d 896; CPL 60.22, subd 1).

While the jury did receive proper instructions with respect to the nature and corroboration requirements of Mayhew's accomplice testimony, the court neglected to give instructions with respect to the nature of accessorial liability (Penal Law, §20.00). The jury at this point was understandably confused and requested supplemental instructions as to "the element of guilt between partners in crime." Counsel for defendant, while raising no objection to giving these supplemental instructions, did request, for the first time, that they be given in conjunction with a charge of criminal facilitation in

both the first and second degrees (Penal Law, §§115.00, 115.05). The court, however, only instructed the jury with respect to the implications of accessorial liability.

We find no error in either the supplemental charge or the refusal to charge criminal facilitation upon the defendant's belated request. At any time the jury, during its deliberations, requests additional instructions concerning the law or the evidence, it is incumbent upon the court to give such instructions (People v Jackson, 20 NY2d 440, 454, cert den 391 US 928; People v Miller, 6 NY2d 152, 156). Of course, this does not mean that the court must respond to all jury inquires at the expense of creating reversible error. It is reversible error, however, to submit to the jury a theory of liability not supported by the evidence adduced at trial or contained in the indictment (CPL 200.70; People v Rosenberg, 293 NY 16, 17). But for

present purposes whether the defendant was the actual perpetrator of the crime or liable as an accessory thereto is irrelevant. There is no distinction between liability as a principal and criminal culpability as an accessory and the status for which the defendant is convicted has no bearing upon the theory of the prosecution (People v Katz, 209 NY 311, 325-326; People v Corbalis, 178 NY 516, 523 [concurring opn]; People v Henry, 18 AD2d 293). Since the jury was already charged that Mayhew was an accomplice as a matter of law, the court's amplification of the charge with respect to the scope of accessorial liability was entirely proper. And, even more fundamental, inasmuch as there was no exception to the supplemental instructions there has been no issue of law preserved for our review (People v Patterson, 39 NY2d 288, 294-295, affd 432 US 197; People v Lang, 36 NY2d 366, 371; People v Rainey, 27 NY 2d 748, 749).

The assignment of error to the refusal of the court to charge criminal facilitation merits little discussion. We need not decide whether under these circumstances a charge of facilitation would have been proper as a lesser included offense for there was no timely request to so charge. So that opposing counsel may have the opportunity to address all offenses that the court will submit to the jury, all requests to submit lesser included offenses, as a general rule, should be made prior to submission to the jury (CPL 300.50, subd 2; 470.05). By failing to make the request until after the jury had commenced its deliberations, defendant waived whatever right he may have had to have facilitation submitted as a lesser included offense (CPL 470.05, subd 2; People v Williams, 31 NY2d 151, 153).

Defendant also contends that the court erred in refusing to permit the jury to hear testimony concerning what are claimed

to be prior statements by Mayhew inconsistent with her testimony at trial. As a general rule, the credibility of any witness can be attacked by showing an inconsistency bewteen his testimony at trial and what he has said on previous occasions (Richardson, Evidence [10th ed-Prince], §501). However, as this testimony is often collateral to the ultimate issue before the jury and bears only upon the credibility of the witness, its admissibility is entrusted to the sound discretion of the Trial Judge whose rulings are not subject to review unless there has been an abuse of discretion as a matter of law (People v Scorge, 301 NY 198, 202). Further, it is necessary that the witness be clearly and fairly apprised of the statements which may be subject to impeachment (Loughlin v Brassil, 187 NY 128, 134). Thus, there must be a proper foundation laid for the introduction of prior inconsistent statements of a witness. In

order to prevent surprise and give the witness the first opportunity to explain any apparent inconsistency between his testimony at trial and his previous statements, he must first be questioned as to the time, place and substance of the prior statement (People v Weldon, 111 NY 569, 575-576; Richardson, Evidence [10th ed-Prince], §502, supra).

Applying these principles to the facts at bar, we find that the testimony of both witnesses was properly excluded. The first, a correction officer at the jail in which Mayhew was incarcerated as a material witness, was uncertain of the tenor and substance of the statement she attributed to Mayhew. The trial court ruled that the proffered testimony was irrelevant. As the witness could not testify to the statement with any degree of precision or specificity, its probative value was negligible and was properly excluded.

The testimony of the second witness, Joseph Allen, the estranged husband of Mayhew, was likewise correctly rejected as a proper foundation for its introduction had not been laid. Allen was prepared to testify that one year prior to the murders, Mayhew had told him that she wanted to get some money from her aunt and would kill her if neccessary. On cross-examination, Mayhew had denied that she told Allen she wanted money from her aunt but was never asked whether she treatened to kill her, the critical inquiry in the entire line of questioning. While it was error to exclude the former statement, such error was indeed harmless since there had been no foundation laid which would permit the introduction into evidence of the latter and more crucial statement as to the threat to slay the aunt.

Accordingly, the order of the Appellate Division should be affirmed.

* *

Order affirmed. Opinion by Cooke, J. All concur.

Decided December 7, 1978

APPENDIX D

ORDER OF AFFIRMANCE
BY APPELLATE DIVISION
OF THE SUPREME COURT
OF THE STATE OF NEW
YORK, FIRST JUDICIAL
DEPARTMENT.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 24, 1977.

HON. M. HENRY MARTUCELLO, Acting Presiding Justice
HON. HENRY J. LATHAM,)
HON. JOHN P. COHALAN, JR.,)
HON. VINCENT D. DAMIANI,) Associate Justice
HON. JOSEPH F. HAWKINS,)

The People of the State of New York,

Respondent,

v.

Ivan Duncan,

Appellant.

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Ivan Duncan, defendant in this action, having appealed to this court from a judgment of the County Court, Westchester County, rendered May 9, 1975; and said appeal having been argued by Frank Silverstein, Esq., of counsel for the appellant, and argued by Joseph Aviv,Esq., of counsel for the respondent, and due deliberation having been there-

on: and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

IRVING SELKIN

Clerk of the
Appellate Division

A D 2d A-October 26, 1976

1798 E The People, etc., respondent, v. Ivan Duncan, appellant.

Frank Silverstein, White Plains, N.Y., for appellant.

Carl A. Vergari, District Attorney, White Plains, N.Y. (Joseph Aviv of counsel), for repsondent.

Judgment of the County Court, Westchester County, rendered May 9, 1975, affirmed.

No opinion.

MARTUSCELLO, Acting P.J., LATHAM, COHALAN, DAMIANI and HAWKINS, JJ., concur.

APPENDIX E

CONSTITUTIONAL PROVISIONS

United States Constitution, Sixth Amendment; Compulsory Process Clause:

"In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor..."

United States Constitution, Sixth Amendment, Right to Counsel Clause:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

United States Constitution, Fourteenth Amendment; Due Process Clause:

"...nor shall any State deprive any person of life, liberty or property, without due process of law..."

APPENDIX F

STATUTES INVOLVED

New York Penal, Section 20.20:

"20.00:Criminal liability for conduct of another.

"When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."

New York Criminal Procedure Law,Section 260.30:

"260.30: Jury Trial; In What Order to Proceed.

"The order of a jury trial, in general, is as follows:

***

8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.

9. The people may deliver a summation to the jury.

10. The court must then deliver a charge to the jury.

11. The jury must retire to deliberate and, if possible, render a verdict."

New York Criminal Procedure Law,Section 300.10(1)

"300.10:Court's charge;In General.

"1.At the conclusion of summations, the court must deliver a charge to the jury.

***

New York Criminal Procedure Law, Section 310.30

"310.30: Jury Deliberation; Request for Information.

"At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and the counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper."

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1978

IVAN DUNCAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	PAGE
Facts	1
POINT I—The trial judge properly charged the jury	4
POINT II—The New York statutory scheme does not violate the constitution	5
POINT III—The trial court did not wrongfully refuse to permit a witness to testify	6
Conclusion	8

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Ivan Duncan,

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The People of the State of New York,

Respondent.

RESPONDENT'S BRIEF

Facts

On September 25, 1974, Margaret Harris, 86, and Estelle Robinson, 77, were found dead in Mrs. Harris' Mt. Vernon apartment, the victims of multiple stab wounds.

The evening of September 24, 1974, Ziriphia Mayhew, a niece of Mrs. Harris, and the defendant, Ivan Duncan, went to Mrs. Harris' apartment to get some "scratch" (money). On the way, the defendant obtained a hammer and placed it in the car. When they arrived at the apartment they discovered that Mrs. Harris had guests. The defendant went into the bathroom and bedroom and shortly thereafter, the couple left the apartment and went for pizza. While at the pizza parlor the defendant, referring to Mrs. Harris, said maybe he could "rip her off."

Upon returning, the couple saw that the car driven by Mrs. Harris' guests was no longer in the parking lot. The defendant's reaction was "Well, let's kill those bitches."

The defendant further stated that if the victim Harris were alone, he would strangle her and make it look as if she fell in the bathtub and that if both victims were present, he would "take care of" Mrs. Robinson and Miss Mayhew should "take care of" Mrs. Harris.

Miss Mayhew got out of the car and the defendant handed her her purse which now contained the hammer. The couple rang the door bell and Mrs. Harris admitted them. After some conversation, Mrs. Harris asked the defendant to move a dresser. After he had done so, Mrs. Harris discovered that she had no money in her purse. Miss Mayhew, knowing that the defendant had stolen the money, said, "Let's go" and he replied, "No."

Mrs. Harris and Miss Mayhew went into the bedroom and engaged in conversation. The defendant, with a hammer in his hand, entered the bedroom and hit Mrs. Harris over the head. The victim got up, said, "Oh, what's this," noticing blood, and went to the bathroom for a towel. While the defendant followed Mrs. Harris into the bathroom, Miss Mayhew called to Mrs. Robinson, who had been sitting in the living room, to call her Aunt Kitty. As Mrs. Robinson approached the phone, which was in the bedroom by the window, the defendant ran over to her and hit her on the head with the hammer. Mrs. Robinson, shouting, "I won't call," fell to the floor.

Mrs. Harris re-entered the bedroom, exclaiming, "Oh, my God. I know this is not your doing, Ziffy." The defendant then hit her again. Both victims were on the floor moaning when the defendant said, "These old bitches won't die."

The defendant left the room, returned with a butcher knife, stepped over Mrs. Harris, and stabbed Mrs. Robinson several times. He then stabbed Mrs. Harris in the chest, and as he did, Miss Mayhew screamed. The defendant told her to "shut up," asked if she wanted to

stay with them and then stabbed Mrs. Harris several times.

The defendant dropped the knife and hammer into a bag, gave it to Miss Mayhew, and said, "Come on." The defendant pushed the bag into a sewer.

The sneakers that the defendant was wearing had blood on the sides and soles and on the cloth above the one-inch rubber sides. The defendant, upon returning home, took them downstairs to the laundry and washed them.

When the victims were discovered the next morning, the bedroom was in a state of disarray with pocketbooks, clothes and papers strewn on the bed and there was blood all over the room. The blood in the bedroom and bathroom contained sneaker prints made by a man wearing fairly new sneakers. The defendant learned about the sneaker prints and disposed of the sneakers that he had worn by throwing them down the incinerator chute.

Detectives asked the defendant what he had been wearing the night before and he responded that, among other things, he had been wearing a pair of black "Little Abner" shoes. That evening, the defendant gave his cousin a pair of black "Little Abner" shoes in exchange for a pair of sneakers. The next day the defendant gave those sneakers to detectives. Later, at headquarters, when told by Mrs. Harris' guests that he had not been wearing shoes, but sneakers, the defendant admitted same.

The defendant testified on his own behalf. He claimed that upon their return from the pizza parlor, Miss Mayhew said that she would go upstairs and ask her aunt for money. He further testified that after she left the car, he waited thirty to forty-five minutes for her to return before he went to the apartment. The defendant states that Miss Mayhew told him there had been a fight and he walked into the bedroom to call the hospital, did not, and left the apartment without entering any other room. The defendant claimed that he disposed of Miss Mayhew's pants along with his sneakers.

The defendant was convicted of the crimes of Murder in the Second Degree (four counts), Attempted Robbery in the First Degree and Possession of a Weapon in the Fourth Degree (two counts). He was sentenced to concurrent terms, the maximum of which was twenty-five years to life.

POINT I

The trial judge properly charged the jury.

The indictment charged the defendant as the actual perpetrator and as being criminally liable for the commission of the crimes if actually committed by another.

> "There is no distinction between liability as a principal and criminal culpability as an accessory and the status for which the defendant is convicted has no bearing upon the theory of the prosecution (*People* v. *Katz,* 209 N.Y. 311, 325-326; *People* v. *Corbalis,* 178 N.Y. 516, 523 (concurring opn); *People* v. *Henry,* 18 A.D. 2d 293)."
>
> *People* v. *Duncan,* 46 N.Y. 2d 74 (Petitioner's appendix, p. 39).

As the evidence unfolded, it became apparent that the crimes charged were committed as alleged and that, in some way, Miss Mayhew was also a participant. Thus, the trial judge charged as a matter of law, that Miss Mayhew was an accomplice because she "participated in some of the criminal conduct attributed to the defendant." The jury, having been told that as a matter of law Miss Mayhew participated in the criminal conduct, could not find that the defendant alone committed the crimes. Seeking clarification, they sent a note to the judge asking, "the element of guilt between partners in crime." In response the trial judge charged Section 20.00 of the Penal Law, "criminal

liability for conduct of another." (Petitioner's appendix, p. 49)

> "Since the jury was already charged that Mayhew was an accomplice as a matter of law, the court's amplification of the charge with respect to the scope of accessorial liability was entirely proper."
>
> (*People* v. *Duncan, supra,* Petitioner's appendix, p. 39).

Counsel for the defendant did not voice any exception to the intended charge and only argued that in light of the judge's determination to charge Section 20.00 of the Penal Law, the jury should also be charged "the crimes of criminal facilitation in both the first and second degrees by way of explanation to the jury." (The defendant's first protest was voiced two days after the charge was given.)

The defendant was not precluded from arguing accomplice liability to the jury and he certainly knew it would be in issue. The District Attorney requested a charge on Section 20.00 of the Penal Law, a request on which there was no ruling, and the defendant requested an accomplice charge which was given. In his summation, a defendant may comment on every material matter of fact and in light of the evidence in the instant case, certainly the liability of the defendant for any acts of Miss Mayhew (*People* v. *Ashwal,* 39 N.Y. 2d 105, 383 N.Y.S. 2d 204 (1976)). The defendant did not request the opportunity for further comment (cf. *People* v. *Ferrone,* 204 N.Y. 551 (1912)).

POINT II

The New York statutory scheme does not violate the constitution.

In the instant case the trial judge did not submit "additional theories of liability to the jury," as alleged by the defendant.

"The status for which the defendant is convicted has no bearing upon the theory of the prosecution."

(*People* v. *Duncan, supra,* Petitioner's appendix, p. 39.)

No theory other than those reflected in the evidence and indictment may be submitted to the jury.

"It is reversible error, however, to submit to the jury a theory of liability not supported by the evidence adduced at trial or contained in the indictment."

(*People* v. *Duncan, supra,* Petitioner's appendix, p. 38.)

While no additional theory may be presented, the New York law permits additional summation in an analogous situation when additional evidence is permitted after summation (*People* v. *Ferrone, supra*). Further summation not having been requested, the defendant cannot complain that it was improperly denied to him.

POINT III

The trial court did not wrongfully refuse to permit a witness to testify.

The defendant proposed to call Joseph Allen to testify that in September, 1973, a year before the instant crimes, Miss Mayhew had told him that she was going to the victim's house to get money and that if she awakened she would kill her and then proceeded to the house with a hammer in her purse. The witness had no information relating to the commission of the crimes charged.

As the proffered testimony related only to a collateral matter, the credibility of a witness, it was necessary to lay a proper foundation for its admission. Miss Mayhew

denied having told Allen that she wanted to get money from her aunt, thus a proper foundation was laid for the contrary statement by Allen. She was not however asked whether she had told Allen that she would kill her aunt if necessary to get the money. There was no proper foundation for the testimony of Allen on that issue. As Miss Mayhew testified that she had gotten money from her aunt on a number of occasions and that that was her intention on the night in question, the error in excluding testimony relating to that statement was harmless beyond a reasonable doubt (*Chapman* v. *California,* 386 U.S. 18 (1967)). As there was no proper foundation for the purported threat, its exclusion was proper.

"On cross examination, Mayhew had denied that she told Allen she wanted money from her aunt but was never asked whether she threatened to kill her, the critical inquiry in the entire line of questioning. While it was error to exclude the former statement, such error was indeed harmless since there was no foundation laid which would permit the introduction into evidence of the latter and more crucial statement as to the threat to slay the aunt."

People v. *Duncan, supra,* Appellant's appendix, p. 43.

The defendant having failed to lay the foundation required by state law cannot now be heard to complain that his constitutional rights were violated (cf. *Wainwright* v. *Sykes,* 433 U.S. 72 (1977)).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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